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No. _____

In The

# Supreme Court of the United States

October Term, 1996

DAVID D. DU VALL,

*Petitioner,*

v.

UNITED STATES OF AMERICA,
U.S. POSTAL SERVICE,
DENNIS WALSCH, Postmaster,
DAN CURTIS, Manager, Customer Response,
AL MENDOZA, Manager, Post Office
Downtown Station,
___ RODRIGUEZ, Postal Clerk,
UNKNOWN DEFENDANTS,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

DAVID D. DU VALL, Pro Se
5206B Huisache Street,
Austin, Texas 78751
(512) 452-4800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED FOR REVIEW

1. Is a judgment on the merits a proper proceeding when rendered by factual issues presented by both parties, rather than by existence of United States District Court for the Western District of Texas Local Rule, in conflict with Federal Rules of Civil Procedure.

2. As the Federal Tort Claims Act requiring explicit prerequisites as evidence, does reliance on Federal Law in formulating Complaint standing for Article III considerations of the Federal Constitution.

## LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

STATUTES INVOLVED IN THIS CASE ..... 2

STATEMENT OF THE CASE ..... 5

REASONS FOR GRANTING WRIT ..... 10

I. THE FIFTH CIRCUIT'S OPINION ON THE MERITS IN THIS CASE IS GROUNDED UPON AN IMPROPER STANDARD FOR SUMMARY JUDGMENT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION ..... 10

II. THE FIFTH CIRCUIT'S OPINION ON THE MERITS DISMISSES APPEAL SOUGHT RELIEF COGNIZABLE UNDER THE FEDERAL TORT CLAIMS ACT TO WHOLLY FRIVOLOUS TO INVOKE FEDERAL JURISDICTION CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION ..... 12

CONCLUSION ..... 15

## INDEX TO APPENDICES

Appendix A Opinion of United States Court of Appeals ..... 1a

Appendix B Order and Judgment of United States District Court ..... 2a

## TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 US 242, 106 S.Ct. 2505, 91 L Ed 2d 202 ..... 11

Dilworth v. Dallas Cty. Commun. College Dist., 81 F.3d 616 (5th Cir. 1996) ..... 12

Hospital Bldg. Co. v. Trustee of the Rex Hospital, 96 S.Ct. 1848 (1976) ..... 10

Kugler v. Helfant, 95 S.Ct. 1524 (1975) ..... 10

Paolini v. Channel Homes Ctrs., 688 F.2d 721 (3d Cir. 1981) ..... 10

Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 US 472 (1982) ..... 14

Watts v. Graves, 720 F.2d 1416 (5th Cir. 1983) ..... 10

STATUTES

39 U.S.C.A. § 409(c) ..... 2

39 U.S.C.A. § 409(e) ..... 4

28 U.S.C.A. § 1339 ..... 1, 2, 5

28 U.S.C.A. § 1346(b) ..... 4

28 U.S.C.A. § 2071(a) ..... 11

28 U.S.C.A. § 2072 ..... 11, 12

28 U.S.C.A. § 2106 ..... 2, 9

28 U.S.C.A. § 2401(b) ..... 3

28 U.S.C.A. § 2674 ..... 3

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C.A. § 2675(a) ..... 3, 12, 13

28 U.S.C.A. § 2680 ..... 12

RULES

Local Rule CV-7(d)(f) ..... 6, 8, 11, 12, 14

Supreme Court Rule 13.1 ..... 2

FRCP 6(b) ..... 6

FRCP 6(b)(2) ..... 6

FRCP 12(a)(2) ..... 5

FRCP 56(a) ..... 5, 10

FRCP 59(e) ..... 7

OTHERS

Supreme Court Standard – Appeal § 1692.3, Remand – Improper Standard for Summary Judgment ..... 10

Supreme Court Standard – Moot Issue, What Circumstances Render Civil Cases, Or Issues Arising Therein, Moot So As To Preclude Supreme Court's Consideration Of The Merits ..... 14

Postal Policy [Article I] ..... 13

5 U.S.C.A. § 552 – [F.O.I.A.] ..... 5

5 U.S.C.A. § 552(a) – [F.P.A.] ..... 1, 4

Federal Tort Claims Act ..... 3, 4

Restatement of the Law (Second) of Torts Vol. 3, § 652B ..... 5

## PETITION FOR WRIT OF CERTIORARI

David D. Du Vall, Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States court of Appeals for the Fifth Circuit entered in this proceeding on August 20, 1996. The compelling reason in that the United States Court of Appeals for the Fifth Circuit has sanctioned such a departure by a lower court, as to call for an exercise of this Supreme Court of the United States power of supervision.

## OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is from sought relief to have Judgment and Order entered in the United States District Court for the Western District of Texas reversed. The Court of Appeals for the Fifth Circuit on August 20, 1996, dismissed Petitioner's appeal for lack of federal jurisdiction.

## STATEMENT OF JURISDICTION

On June 9, 1995, Petitioner filed suit against Respondents named in the proceeding cognizable under the Federal Tort Claims Act, and premised his claims upon alleged violations arising out of Postal Matters pursuant to 28 U.S.C.A. § 1339, Federal Privacy Act of 1974, applicable State Law.

The United States District Court for the Western District of Texas dismissed all of Petitioner's claims with

prejudice; under Local Rules of the court. Precluded Petitioner's filing objections to Respondents Motion to Dismiss and in the alternative Summary Judgment; in conflict with Federal Rules of Civil Procedure.

Upon timely appeal, the United States Court of Appeals for the Fifth Circuit on August 20, 1996, issued an Opinion finding Petitioner's Complaint lacked federal jurisdiction and dismissed appeal as frivolous, gives rise to this petition.

The United States Court of Appeals for the Fifth Circuit further threaten the imposition of sanctions; motion for rehearing was sought. Pursuant to Supreme Court Rule 13.1 this petition has been filed within 90 days of the issued opinion dated August 20, 1996.

The jurisdiction of the Court's authority is invoked pursuant to 28 U.S.C.A. § 2106.

## STATUTES INVOLVED IN THE CASE

28 U.S.C.A. § 1339 – Postal Matter, provides:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

39 U.S.C.A. § 409(c) – Suits by and against the Postal Service, provides:

> The provisions of Chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

Federal Tort Claims Act – Chapter 171 Tort Claims Procedure 28 U.S.C.A. § 2674 – Liability of the United States, provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C.A. § 2675(a) – Disposition by federal agency as prerequisite; evidence, provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

Federal Tort Claims Act – Chapter 161, Time for Commencing Action 28 U.S.C.A. § 2401(b) – Time for commencing action against United States, provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Federal Tort Claims Act – Chapter 85 United States as Defendant 28 U.S.C.A. § 1346(b) – United States as defendant, provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

39 U.S.C.A. § 409(e) – Suits by and against the Postal Service, provides:

> A judgment against the Government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal Service.

Federal Privacy Act of 1974

Restatement of the Law (Second) of Torts, Vol. 3 652B – Intrusion upon Seclusion, provides:

> One who intentionally intrudes, physically or otherwise upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

5 U.S.C.A. § 552 – Freedom of Information Act Applicable State Law

## STATEMENT OF THE CASE

On the 9th day of June, 1995, Petitioner filed Original Complaint pursuant to Title 28 U.S.C.A. § 1339 (Postal Matters) in the United States District Court for the Western District of Texas, seeking monetary damages (unspecified damages) for personal injuries suffered by the wrongful termination of Post Office Box address, violated clearly established federal secured right: resulting in an ongoing invasion of his privacy; intrusion upon his personal affairs; and a deprivation of freedom to receive information addressed to Petitioner. Personal injuries in tort are pursued under the Federal Tort Claims Act.

In response to Petitioner's Original Complaint, Respondents on the 13th day of November, 1995, filed their Motion to Dismiss or, in the alternative, for Summary Judgment.

**Note**, pursuant to Federal Rules of Civil Procedure 12(a)(2) and 56(a) extends a period of 20 days to respond

to Respondents' Motion to Dismiss or, in the alternative, for Summary judgment.

On the 30th day of November, 1995, the United States Court for the Western District of Texas under Local Rule CV-7(d)(f) dismisses Petitioner's Original Complaint with prejudice. Precluded the opportunity to respond or file objection under Federal Rules of Civil Procedure.

The United States District Court for the Western District of Texas under Local Rule CV-7(d)(f) granted Respondents' Motion to Dismiss or, in the alternative, Summary Judgment on the merits.

**Note**, the United States District Court for the Western District of Texas entered its Order and Judgment during the 20 day time period provided under Federal Rules of Civil Procedure 12(a), (2) and 56(a). Pursuant to Federal Rules of Civil Procedure 6(b), (1) (with or without motion or notice order the period enlarged if requested therefor is made before the expiration of the period originally prescribed or as extended by a previous order). On the 6th day of December, 1995, filed his *Motion for Extension of Time to File Responsive to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment*. Under same said Motion, Petitioner in response to United States District Court for the Western District of Texas Local Rule CV(d)(f), requested an extension of time pursuant to Federal Rules of Civil Procedure 6(b)(2) (upon motion made after the expiration date of the specified period permit the act to be done where the failure to act was the result of excusable neglect; . . . ).

On the 11th day of December, 1995, the United States District Court for the Western District of Texas entered

Order denying Petitioner's Motion for Extension of Time to File Responsive Pleadings to Defendants' Motion to Dismiss or, in the Alternative, Summary Judgment, as *Moot*.

**Note**, on the 13th day of December, 1995, Petitioner filed a timely *Motion to Vacate Court's Order and Judgment*, pursuant to Federal Rules of Civil Procedure 59(e), among other post judgment motions, giving **Notice that Plaintiff on appeal shall challenge the constitutionality of the United States District Court for the Western District of Texas Local Rule CV-7(d)(f) as applies to pro se litigants similarly situated**, stated in Section II of Motion to Vacate Court's Order and Judgment.

On the 15th day of December, 1995, The United States District Court for the Western District of Texas entered Order Denying all Petitioner's post judgment motions for relief.

**Note**, Petitioner filed a Complaint, alleging he entered a rental agreement with the U.S. Postal Service for a post office box and mail services, establishing a mailing address. (Complaint, ROA p.2) Maintaining the post office box address for over 5 years, the wrongful termination of Petitioner's post office box by the U.S. Postal Service violated a real property interest. (Complaint, ROA p.2) U.S. Postal Service unmindfulness to exercise due care in their assessment of the seriousness of the Petitioner's claim written before the Respondents, when Petitioner request for the immediate return post office box; procedurally no mediation was in place or guidelines that would allow the individual claimant to assert the action being taken. (Complaint, ROA pp.2, 3, 4)

Respondents' unreasonable lack of concern to the seriousness of the offense, resulted to an evasion of privacy; intrusion upon his personal affairs; and a deprivation of a freedom to receive information addressed to Petitioner; justiciable claims for personal injuries suffered, cognizable under the Federal Tort Claims Act and Applicable State Law.

The United States District Court for the Western District of Texas Local Rule CV-7(d)(f) empowered the discretion to dismiss Petitioner's Original Complaint involuntarily WITH PREJUDICE.

The United States District Court for the Western District of Texas Local Rule CV-7(d)(f) empowered the discretion to further order all claims and pending motions are DISMISSED AS MOOT.

On the 29th day of December, 1995, Petitioner filed a timely *Notice of Appeal* giving reference to how appeal would be prosecuted, making specific reference to Motion to Vacate Court's Order and Judgment explained formerly in paragraph 8.

In the United States Court of Appeals for the Fifth Circuit Petitioner's appeal was taken, challenged the validity of the United States District Court for the Western District of Texas Local Rule CV-7(d)(f).

**Note**, Petitioner addressed the United States Court of Appeals for the Fifth Circuit in the *SUMMARY OF APPELLANT'S ARGUMENT*, premise his claims upon the following:

The Constitution and Federal Statutes grants this Court of Appeals' jurisdiction to reverse, in this case, any

order or judgment rendered under Local Rules of District Courts, inconsistent with Federal Rules of Civil Procedure as a MATTER OF LAW.

APPLICATION OF LOCAL RULE PRECLUDES, PRO SE LITIGANTS FUNDAMENTAL RIGHTS TO PROCEED TO TRIAL ON THE MERITS.

The United States Court of Appeals for the Fifth Circuit ruled on the merits of the case.

On the 20th day of August, 1996, the United States Court of Appeals for the Fifth Circuit, issued an Opinion finding Petitioner's claims alleged in Original Complaint lacked federal jurisdiction and dismissed appeal as frivolous gives rise to this Petition.

The United States Court of Appeals for the Fifth Circuit further threaten the imposition of sanctions, motion for rehearing was not sought.

Petitioner seeks relief in the Supreme Court of the United States, under 28 U.S.C.S. § 2106 – REMAND PROVISIONS, 55 L Ed 2d 872, ANNOTATION, titled as follows:

**SUPREME COURT VIEWS AS TO CONSTRUCTION AND APPLICATION OF PROVISIONS OF 28 USCS § 2106 AUTHORIZING SUPREME COURT AND OTHER FEDERAL APPELLATE COURTS TO REMAND CAUSE AND DIRECT ENTRY OF SUCH APPROPRIATE JUDGMENT OR REQUIRE SUCH FURTHER PROCEEDINGS AS MAY BE JUST UNDER THE CIRCUMSTANCES**

## REASONS FOR GRANTING WRIT

### I. The Fifth Circuit'S Opinion On The Merits In This Case Is Grounded Upon An Improper Standard For Summary Judgment Calls For An Exercise Of This Court's Power To Supervision.

The U.S. District Court's decision below in fact denies a right to a trial on the merits. The importance of this ruling with respect to due process rights of individual litigants is substantial.

For example, Respondents assert their argument for summary judgment pursuant to Federal Rules of Civil Procedure 56, but the record would indicate their motion as 12(b)(6), a motion brought under this Rule (to dismiss for failure to state a claim will extend the time to answer. The motion performs the same function as the old general demurrer, in that it admits the well-pleaded material allegations of the complaint), Hospital Bldg. Co. v. Trustee of the Rex Hospital, 96 S.Ct. 1848 (1976); Kugler v. Helfant, 95 S.Ct. 1524 (1975), but denies their legal sufficiency; Also see, Watts v. Graves, 720 F2d 1416 (5th Cir. 1983); Paolini v. Channel Homes Ctrs., 688 F2d 721 (3d Cir. 1981) (dismissal was improper where the material allegations of plaintiff's complaint, viewed in their most favorable light, were legal sufficiency to establish a claim).

The proper standard for summary judgment may be discussed here in Appeal § 1692.3, Remand – Improper Standard for Summary Judgment as follows:

> Defendants' motion to dismiss for failure to state's claim upon which relief could be granted, or, in the alternative, for summary judgment,

> would be treated as motion for summary judgment, since both parties submitted affidavits and other matters outside the pleadings.

The United States Supreme Court in Anderson v. Liberty Lobby, Inc., 477 US 242, 106 S.Ct. 2505, 91 L Ed 2d 202, as defined.

Clearly, this is not the case, the summary judgment before the United States Court of Appeals for the Fifth Circuit is *one sided* indeed, the United States District Court for the Western District of Texas Local Rule CV-7(d)(f) precluded the filing of affidavits and other matters outside the pleadings. The U.S. District Court's treatment of such litigation in this case seldom will survive much beyond the filing of Original Complaint, and appellate review will be effectively denied.

Consequently, the Fifth Circuit has authorized and condoned a practice that effectively denies a favorable decision that would likely redress the injury.

APPLICATION OF LOCAL RULE PRECLUDES, PRO SE LITIGANTS FUNDAMENTAL RIGHTS TO PROCEED TO TRIAL ON THE MERITS.

Pursuant to 28 U.S.C.S. § 2072 (empowers the U.S. Supreme Court to promulgate the general rules that govern practice and procedure in the federal courts); (no reminder is needed that neither a rule nor a statute can upset a constitutional requirement.)

The U.S. District Court's decision clearly violated this provision, a duty to act accordingly existed, and the failure to act accordingly was a clear violation of the Constitution. See 28 U.S. C.S. § 2071(a) as follows:

> The Supreme Court and all courts establish by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Certiorari is appropriate.

## II. The Fifth Circuit Opinion On The Merits Dismisses Appeal Sought Relief Cognizable Under The Federal Tort Claims Act to Be Wholly Frivolous To Invoke Federal Jurisdiction Calls For An Exercise Of This Court's power Of Supervision.

The Federal Tort Claims Act requires an explicit prerequisite as evidence, as to how a claim must be presented to the Federal agency. See 28 U.S.C.A. § 2675(a) In addition, 28 U.S.C.A. § 2680 of the Federal Tort Claims Act, provides for a number of exceptions to the general waiver of sovereign immunity. Claims for money damages against all Respondents in the proceeding are cognizable under said Act.

The Fifth Circuit ruled on the merits of the case, dismissing appeal as wholly frivolous to invoke federal jurisdiction and refused to consider the validity of the United States District Court for the Western District of Texas CV-7(d)(f) before it.

In reaching its decision, the Fifth Circuit applied its own standard found in the case of Dilworth v. Dallas Cty. Commun. College Dist., 81 F.3d 616, 617 (5th Cir. 1996). Respectfully, the Fifth Circuit's ruling in Dilworth, and

reliance thereon in case sub judice is clearly unrelated to claims under the Federal Tort Claims Act.

Clearly, there is a public interest involved, concerning a person's livelyhood, the freedom to receive information by mail when conducting one's affair, as defined in Postal Policy [Article I]:

> The U.S. Postal Service is operated as a fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service has as its basic function the obligation to bind the Nation together through the correspondence of the people. It is charged with providing prompt, reliable, and efficient service throughout the Nation . . .

Being involved in various legal matters before the Federal and State Courts here in Austin and Washington, D.C., Petitioner suffered actual as well as personal injuries as result of Respondents' putatively illegal conduct. Petitioner was lulled into believing that his claim was being managed. Unable to afford the expense, took time to take a trip to Washington, D.C., to the Office of the Postmaster General and because of the visit to the Postmaster General Office would meet the prerequisite as evidence under 28 U.S.C.A. § 2675(a).

Petitioner maintains a mail box at his residence, open to the view of the public, an continuing intrusion upon his privacy, in that matters before the Federal and State Courts mail to him are exposed to public scrutiny, and that a favorable decision will likely redress the injuries.

Consequently, the Fifth Circuit has decided that Petitioner's claims under the Federal Tort Claims Act lacked standing, notwithstanding fact that the summary judgment before it was improper and the subsequent harm it poses with respect to due process rights of individuals is substantial.

The United States Supreme Court in Valley Forge College, 454 US at 472, defined standing:

> On the constitutional side, Article III limits federal court adjudication to matters which achieve the stature of justiciable cases or controversies. Ordinarily, this means that a party invoking the court's authority must show: (1) that he or she suffered some actual or threatened injury as a result of the defendant's putatively illegal conduct, (2) that the injury may fairly be traced to the challenged action, (3) that a favorable decision will likely redress the injury.

The United States District Court for the Western District of Texas Local Rule CV-7(d)(f) empowered the court to dismiss all claims against all Respondents cognizable under the Federal Tort Claims Act. The said Act maintains an explicit prerequisite as to how a claim must be present and maintain in the complaint before the court, may in fact undermine principal intent of Act, creating a potential manipulation rending the case "capable of repetition, yet evading review".

The United States Supreme Court in Van Lare, 44 L Ed 2d 745, Moot Issue – Supreme Court, Titled What Circumstances Render Civil Cases, Or Issues Arising

Therein, Moot So As To Preclude Supreme Court's Consideration Of The Merits.

Certiorari is Appropriate.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID D. DU VALL,
*Petitioner, pro se*

DATE NOVEMBER 18, 1996

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 96-50027
Conference Calendar

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DAVID D. DU VALL,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. A-95-CV-331

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(Filed Aug. 20, 1996)

Before KING, DUHÉ, and DeMOSS, Circuit Judges.
PER CURIAM:*

David D. Du Vall appeals from the district court's grant of summary judgment in favor of the Defendants and the dismissal of his suit concerning the mistaken re-assignment of his rented post office box. We do not reach the merits of the appeal as Du Vall's suit is facially frivolous, insubstantial, and "insufficient to invoke the

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

jurisdiction of a federal court." *Dilworth v. Dallas Cty. Commun. College Dist.*, 81 F.3d 616, 617 (5th Cir. 1996) (civil rights suit in which student complained of receiving a "B" in English). As Du Vall's suit was so patently trifling as to fail to invoke federal jurisdiction, his appeal is frivolous, and it is DISMISSED as such. *See* 5TH CIR. R. 42.2.

We caution Du Vall that any additional frivolous appeals filed by him or on his behalf will invite the imposition of sanctions. To avoid sanctions, Du Vall is further cautioned to review any pending appeals to ensure that they do not raise arguments that are frivolous.

APPEAL DISMISSED; SANCTION WARNING ISSUED.

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**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| DAVID D. DU VALL | § | |
| | § | CIVIL NO. |
| VS. | § | A-95-CA-331 JN |
| UNITED STATES OF AMERICA, ET AL. | § | (Filed Nov. 30, 95) |
| | § | |
| | § | |

## ORDER AND JUDGMENT

Before the Court is the Government's Motion to Dismiss or, in the Alternative, for Summary Judgment filed on November 13, 1995. Plaintiff has not filed any response. Defendants' motion, therefore, is unopposed under Rule CV-7(d) of the Local Rules of the United States District Court for the Western District of Texas. After thoroughly reviewing the motion and the applicable law in this case, the Court finds that Defendants' motion is meritorious and should be granted.

ACCORDINGLY IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment is hereby GRANTED and that Plaintiff's claims are hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that this cause is CLOSED and any pending motions are hereby DISMISSED AS MOOT.

SIGNED AND ENTERED this 30th day of November, 1995.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

A true copy of the original. I certify,

Clerk, U.S. District Court

By: /s/ Toni Cheshire
Deputy